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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Telecommunications Services)	CS Docket No. 95-184
Inside Wiring)	
)	
Customer Premises Equipment)	
)	
)	
In the Matter of)	
)	
Implementation of the Cable)	MM Docket No. 92-260
Television Consumer Protection)	
and Competition Act of 1992)	
)	
Cable Home Wiring)	

COMMENTS OF COX COMMUNICATIONS, INC.
ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

When evaluating whether and how to regulate exclusive contracts for the provision of multichannel video programming in multiple dwelling units (MDUs), the Commission should remain focused on its objective in this proceeding: to foster the ability of consumers who live in MDUs to choose among competing video service providers. In Cox's experience, exclusive service arrangements undermine rather than advance this goal. The disadvantages of exclusive service contracts are apparent. MDU residents are able to obtain service only from a single, pre-selected service provider. MDU owners also are motivated to accept financial incentives from an exclusive provider instead of securing a range of competitive service offerings for their tenants. And, MDU owners lose the flexibility to switch providers or bring in a new one should they become dissatisfied with their current providers' performance.

At the same time, the public interest benefits of exclusive arrangements are elusive. As the record in this proceeding reveals, the MDU marketplace increasingly is attracting large, well-financed companies, and numerous cable systems already face head-to-head competition within MDUs. The claim that exclusive contracts are essential to the emergence and survival of MDU competition thus is belied by the record evidence. Similarly, the assertion that decreasing an incumbent cable operator's market share through protectionist MDU arrangements will somehow increase competition is but a Siren's song. In reality, such arrangements eliminate individual subscriber choice and deprive MDU residents of the myriad benefits that otherwise would result from in-building competition.

The Commission accordingly should preclude multichannel video programming distributors (MVPDs) from entering into exclusive MDU contracts in the future. Should it decide against this course, the Commission at minimum should adopt rules which (1) ensure that all MVPDs are able to enter into exclusive arrangements in MDUs, (2) limit exclusive arrangements to a reasonable term such as five years, and (3) prohibit exclusive MDU arrangements from extending beyond the provision of multichannel video programming.

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COMMENTS OF COX COMMUNICATIONS, INC. ON
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Cox Communications, Inc. ("Cox"), by its attorney, hereby submits its comments on the Second Further Notice of Proposed Rulemaking, FCC 97-376 (released October 17, 1997)("Second Further Notice") in the above-referenced proceedings.

I. INTRODUCTION

Cox is one of the country's largest MSOs with over 3.3 million cable customers nationwide. Roughly 80 percent of Cox's customers are served by nine regional system clusters located in densely-populated areas such as San Diego and Orange County, California, Phoenix, Arizona, and Hampton Roads, Virginia.¹ Over the next several years, Cox plans to offer a full array of two-way digital television, data and telephony

¹ The remaining Cox clusters are located in New Orleans, Louisiana; Omaha, Nebraska; Oklahoma City, Oklahoma; the panhandle of Florida; and New England.

services to businesses and residences (including multiple dwelling units ("MDUs")) throughout its regional clusters.

For a number of years, Cox has been providing cable service to consumers living in MDUs pursuant largely to non-exclusive service contracts. These contracts typically run for a period of five years. Cox has long believed that it does not need service exclusivity in order to provide high-quality, reasonably-priced video programming services to MDU residents. It further believes, as it has stated throughout this proceeding, that exclusive service arrangements between multichannel video programming distributors (MVPDs) and MDU owners are far more likely to hinder the development of full facilities-based competition than to help it.² Cox thus supports a Commission policy which in the future prohibits exclusive service arrangements in MDUs. Should the Commission nonetheless decide to continue to allow exclusive MDU contracts, it should (1) apply the same rules to incumbent providers and new entrants alike, (2) limit exclusive arrangements to a reasonable period such as five years, and (3) not permit an exclusive contract to extend to anything other than the provision of multichannel video programming.

II. EXCLUSIVE MDU SERVICE CONTRACTS UNDERMINE INDIVIDUAL CONSUMER CHOICE

The Commission's stated goal throughout this proceeding has been to adopt policies which foster the ability of subscribers who live in MDUs to choose among

² See Comments of Cox Communications, Inc. (filed March 18, 1996) at 27; Comments of Cox Communications, Inc. on Further Notice of Proposed Rulemaking (filed September 26, 1997) ("Cox Comments on Further Notice") at 9-10.

competing video service providers.³ The Commission also has acknowledged that consumer choice is enhanced if competing service providers are able to install multiple broadband networks in MDUs.⁴

Cox agrees wholeheartedly that the Commission's objective should be to promote full facilities-based competition throughout an MDU. It is concerned, however, that the Commission is implementing rules which make the development of such competition less, instead of more, likely. Although the Commission agrees that nondiscriminatory access to MDUs for video and telephony service providers enhances competition, it has declined thus far to adopt a federal mandatory access requirement.⁵ It also has encouraged landlords to select a single service provider through its adoption of the building-by-building option for disposing of home run wiring. Under this option, MDU owners are permitted to convert an entire building to a new service provider, rather than being required to allow two or more video service providers to compete for subscribers on a unit-by-unit basis. And, the Second Further Notice accepts with little discussion the argument that exclusive service contracts can be pro-competitive; it simply seeks comment on whether they should be limited in some fashion, either by restricting their term or by prohibiting certain types of providers (i.e., incumbent operators) from taking advantage of them.⁶

³ See, e.g., Second Further Notice at ¶¶ 35, 36; Further Notice of Proposed Rulemaking, FCC 97-304, (released August 28, 1997) ("Further Notice") at ¶¶ 25, 26.

⁴ Further Notice at ¶ 62.

⁵ Second Further Notice at ¶ 178. In earlier comments in this proceeding, Cox urged the Commission to require MDU owners to permit the installation of multiple broadband networks. See Cox Comments on Further Notice at 5-8.

⁶ Second Further Notice at ¶ 258.

Cox believes that, rather than taking additional steps which inevitably will foreclose in-building competition, the Commission should take all actions it can to open up MDUs to more than one service provider. As the Commission has observed, a significant portion of the nation's population lives in MDUs, with MDUs comprising roughly 28% of total housing units nationwide in 1990.⁷ Allowing multiple broadband networks to be installed throughout an MDU is the best way of ensuring that MDU residents have a real choice of services – services which today often include advanced data and telephone offerings in addition to multichannel video. The Commission wouldn't think of adopting regulatory policies which intentionally restrict the number and variety of services that are offered to consumers who live in single family homes. There is no reason why subscribers who happen to live in apartment buildings and condominiums should not enjoy a similar range of service choices.

As Cox has observed earlier in this proceeding, the Commission does not have authority to abrogate existing service contracts.⁸ However, the Commission should be very wary of permitting exclusive MDU service contracts to be negotiated in the future. The downsides to exclusive contracts are obvious. Such arrangements deprive MDU residents of any real choice; telling apartment or condominium dwellers to move if they wish to switch video service providers is not an acceptable solution. Exclusive service contracts also encourage the payment of financial and other incentives to MDU owners

⁷ *Id.* at ¶ 36.

⁸ *See* Letter from Peter H. Feinberg, Esq., Counsel to Cox Communications, Inc., to Meredith Jones, Esq., Chief, Cable Services Bureau (January 31, 1997).

which provide absolutely no benefit to the MDU residents.⁹ Rather than evaluating which provider would provide the best service to its tenants, MDU owners instead are motivated to select an exclusive provider based upon which company offers the most lucrative financial package for the MDU owner. And, exclusive arrangements limit MDU owner flexibility to switch providers or to bring in a new provider if it becomes dissatisfied with the current provider's performance.

At the same time, the public interest benefits of exclusive arrangements are difficult to discern. The assertion that exclusive arrangements are critical if MDU service providers are to survive is belied by Cox's own experience with non-exclusive contracts and by the experiences of other cable operators that offer service in direct competition with alternative providers in the same building.¹⁰ These experiences demonstrate that the provision of video programming services in an MDU is hardly a "natural monopoly." It certainly is true that in-building competition reduces profit margins, lengthens the period over which a company can expect to recoup its investment and forces service providers to use more efficient technology, improve service offerings and otherwise cut costs. The Commission's task, however, is not to protect certain MVPDs from these competitive forces. To the contrary, the Commission's job is to take whatever steps it can to ensure

⁹ In an effort to prevent such "kick-backs," several states have enacted statutes which prohibit landlords from demanding or accepting payment of any kind from a provider of cable television service in exchange for allowing access to that service. See Cox Comments on Further Notice at 9 and fn. 24.

¹⁰ The record reveals, for example, that as of September 1997, 247 MDUs in Manhattan have opted to allow two-wire competition. Second Further Notice at ¶ 37. Similarly, Cablevision has reported that it provides service to at least 353 MDUs with two internal distribution systems. Further Notice at ¶ 30.

that such forces continue to exist. "The marketplace, not the FCC, should determine winners and losers."¹¹

The current MDU marketplace is inhabited by well-heeled companies that are willing and able to do what it takes to compete with cable for MDU customers. Large satellite companies such as DirecTV and Echostar are joining forces with smaller SMATV operators to challenge the provision of video programming by cable operators on a more cost-efficient basis.¹² Sophisticated telephone companies such as Ameritech, OpTel and RCN have jumped into the fray. In the face of such competition, there is simply no need or rationale for the Commission to adopt a protectionist policy that eradicates consumer choice. Indeed, in the local exchange market, Cox is a small player that has spent literally billions of dollars upgrading its network in order to compete with behemoths such as the Bell Operating Companies. It will compete on the strength of its business plan and the quality and value of its telephone service – not from behind the protective shield of exclusive service contracts.

In addition, the claim by some MVPDs that exclusive contracts in MDUs are the best means of ensuring high quality services at competitive prices¹³ turns the concept of competition on its head. The constant threat that MDU residents individually, or the MDU owner itself, might select another competitor provides the greatest motivation to constantly improve service offerings and price. Indeed, this continuing dynamic is the

¹¹ Press Statement of Commissioner Susan Ness Regarding Spectrum Auctions (released October 27, 1997).

¹² See "MDU Market Attracts Notice As Competition Enters Field," Multichannel News, Vol. 18, No. 50 (December 15, 1997).

¹³ See, e.g., Comments of OpTel, Inc. (filed March 18, 1996) at 7; Consolidated Reply Comments of OpTel, Inc. (filed April 17, 1996) at 3-4.

very essence of “competition.” While a group of service providers may jockey among themselves to win an exclusive contract, and offer some enticements to the MDU owner as part of their sales pitch, the fact remains that the incentive to constantly improve service over time diminishes as soon as the exclusive arrangement is finalized. Yet maintaining this incentive is especially important in an era when communications services – and the many benefits they provide – change almost daily.

Some alternative providers may assert that incumbent cable operators’ overall share of the market will decrease if “new entrants” are permitted to enter exclusive MDU service arrangements. The Commission should not mistake any such decrease with an increase in meaningful competition. While alternative providers may successfully increase their own market share under this scenario, the undeniable fact is that individual subscriber choice among MDU residents will have been reduced, not expanded. As noted above, the Commission’s objective in this proceeding should not be simply to increase competition among MVPDs to serve entire MDUs – particularly since, in Cox’s experience, this part of the market already is competitive.¹⁴ Rather, the Commission should remain focused on its stated goal for this rulemaking: to increase the ability of subscribers who live in MDUs, and not their landlords, to choose among competing service providers.¹⁵

Finally, allowing exclusive contracts would run counter to policy makers’ prior

¹⁴ A recent article in Multichannel News suggests that Cox’s experience is not unique. “Cable operators serving apartment buildings and other multiple-dwelling-unit markets are facing increased competition from all sides.” “MDU Market Attracts Notice As Competition Enters Field,” Multichannel News, Vol. 18, No. 50 (December 15, 1997) at 6.

¹⁵ See, e.g., Further Notice at ¶¶ 25, 26.

determinations that exclusive service arrangements hamper competition. Numerous states have adopted right of access laws, and the Commission itself has observed that a mandatory, nondiscriminatory right of access to MDUs “enhances competition.”¹⁶ Yet the benefits that such access affords disappear if the MDU owner is permitted to sign an exclusive contract with a single provider. In the 1992 Cable Act, moreover, Congress prohibited franchise authorities from awarding exclusive franchises, stating that “exclusive franchises are directly contrary to federal policy” and “artificially protect [the service provider] from competition.”¹⁷ The same rationale applies with equal force here.

The Commission accordingly should adopt a rule which precludes MDU owners and MVPDs from signing exclusive service contracts in the future.

III. LIMITS SHOULD BE PLACED ON EXCLUSIVE SERVICE CONTRACTS IF THEY ARE PERMITTED TO CONTINUE

If the Commission allows MVPDs to continue to negotiate exclusive MDU service contracts, it at minimum should set certain parameters for their use. First, all competitors in the multichannel video marketplace should be able to enter into exclusive service arrangements, not just those that are perceived as possessing insufficient “market power.” Second, exclusive contracts should be limited to the shortest reasonable term, such as five years. And, third, exclusive contracts should extend only to the provision of multichannel video programming services, and should not encompass data or telephony services.

¹⁶ See n.5, *supra*.

¹⁷ H.R. Rep. No. 862, 102d Cong., 2d Sess. at 77 (1992).

A. All MVPDs Should Be Permitted to Sign Exclusive Contracts

In the Second Further Notice, the Commission asks whether it “should only limit exclusive contracts where the MVPD involved possesses market power.”¹⁸ The Commission then cites a Supreme Court statement that “[e]xclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.”¹⁹

Cox believes that allowing some service providers but not others to enjoy exclusive service arrangements would unfairly tilt the playing field and do little to promote the development of facilities-based competition throughout MDUs. In Cox’s case, it does not promote the use of exclusive service contracts in MDUs, so it can hardly be said to be freezing other MVPDs out of the “market,” no matter how broadly or narrowly that term is defined. There accordingly would be no factual predicate for precluding Cox, as a matter of law, from signing exclusive deals but allowing its competitors to do so. Moreover, to the extent the market is best defined as the contested MDU, an exclusive service arrangement -- even one signed by an alternative provider -- excludes all other sellers and thus would be seen as an unreasonable restraint on trade under the Supreme Court precedent cited by the Commission. A rule which prohibited an incumbent cable operator from signing an exclusive contract, but permitted an alternative provider to do so, would obviously do nothing to cure this deficiency.

In addition, there is no policy justification for depriving MDU residents of service choice simply because an alternative provider would like to increase, and then protect, its

¹⁸ Second Further Notice at ¶ 261.

¹⁹ *Id.* (cites omitted).

share of a more broadly-defined market through exclusive MDU contracts. Underlying the proposal is the erroneous assumption that, in all cases, MDU residents would gladly walk away from an incumbent provider and sign an exclusive deal with a competitor. However, as any company that operates in a competitive market will attest, consumers want choice. Once they are presented with it and are given an opportunity to check out the competition, they often prefer to stay with their current provider. Indeed, this has been Cox's experience in the many markets where it faces strong competitors. Enabling those competitors to lock up a significant percentage of Cox's customers while depriving the company of the ability to do the same hardly seems reasonable – particularly since Cox historically has not encouraged the use of exclusive MDU service contracts. The Commission therefore should either disarm all competitors completely by prohibiting exclusive contracts, or arm them all equally by applying the same rules to all MVPDs.

B. Exclusive Contracts Should Be Limited to Reasonable Terms

In the event the Commission decides to allow MVPDs to continue to negotiate exclusive MDU contracts, it should limit those contracts to the shortest reasonable term, such as five years. The longer the period of exclusivity, the longer MDU residents are deprived of service provider choice. The Commission therefore should err on the side of limiting exclusive service arrangements to the minimum number of years supported by the record. At the moment, that minimum is five years.²⁰

²⁰ See Second Further Notice at ¶ 259 (observing that exclusivity proposals in record range from a minimum of five years to a maximum of ten years).

C. Exclusive Contracts Should Not Apply to the Provision of Non-Video Services Such as Data and Telephony

If the Commission permits exclusive MDU service contracts to continue, it should ensure that those contracts are limited to the provision of multichannel video programming services and do not encompass the provision of either data services such as Internet access or traditional telephone services. At the outset, the Commission has held that Title II common carriers may not enter into exclusive service arrangements²¹ and that conclusion need not be revisited here. Questions may arise, however, since cable operators such as Cox and alternative providers such as OpTel and RCN all intend to provide packages of video and telephone services to their MDU subscribers. The Commission thus should clarify that any exclusive arrangement entered into with an MDU owner may not encompass any Title II services also provided by the MVPD.

Similarly, the Commission should preclude MDU owners from signing exclusive contracts for the provision of data services such as Internet access. The focus of this proceeding has been on promoting video competition in MDUs. Unlike the multichannel video programming business, the data marketplace is still in its infancy and is currently characterized by a multitude of players, all of whom are competing vigorously for customers. In order to ensure that MDU residents are able to enjoy the benefits of this competition to the same extent as their neighbors who live in single family homes, the

²¹ See AT&T Communications Revisions to FCC Tariff No. 12, 4 FCC Rcd 4932, 4938 (holding that contract offerings under Tariff 12 were unlawfully restricted to specific customers), recon. denied 4 FCC Rcd 7928 (1989), rev'd in part sub nom MCI Telecommunications Corp. v. FCC, 917 F.2d 30 (D.C. Cir. 1990)(holding that FCC improperly failed to consider additional grounds for finding tariff filings unlawful).

Commission should not permit MVPDs to include data services in any exclusive MDU service contracts they negotiate.

IV. CONCLUSION

For the foregoing reasons, Cox requests that the Commission prohibit MDU owners from negotiating exclusive service contracts with MVPDs in the future. Should the Commission deny this request, Cox urges it at minimum to (1) ensure that all MVPDs are able to enter into exclusive service arrangements, (2) limit exclusive arrangements to a reasonable term such as five years, and (3) prohibit exclusive arrangements from extending beyond the provision of multichannel video programming.

Respectfully submitted,

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